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12 CFR Ch. III (1–1–14 Edition)

(3) A futures commission merchant; and

(4) An affiliated person of a futures commission merchant.

Retail forex customer means a customer that is not an eligible contract participant, acting on his, her, or its own behalf and engaging in retail forex transactions.

Retail forex obligations means obligations of a retail forex customer with respect to retail forex transactions, including, but not limited to, trading losses, fees, and commissions.

Retail forex proprietary account means: a retail forex account carried on the books of an FDIC-supervised insured depository institution for one of the following persons; a retail forex account of which 10 percent or more is owned by one of the following persons; or a retail forex account of which an aggregate of 10 percent or more of which is owned by more than one of the following persons:

(1) The FDIC-supervised insured depository institution;

(2) An officer, director or owner of ten percent or more of the capital stock of the FDIC-supervised insured depository institution; or

(3) An employee of the FDIC-supervised insured depository institution, whose duties include:

(i) The management of the FDIC-supervised insured depository institution's business;

(ii) The handling of the FDIC-supervised insured depository institution's retail forex transactions;

(iii) The keeping of records, including without limitation the software used to make or maintain those records, pertaining to the FDIC-supervised insured depository institution's retail forex transactions; or

(iv) The signing or co-signing of checks or drafts on behalf of the FDIC-supervised insured depository institution;

(4) A spouse or minor dependent living in the same household as of any of the foregoing persons; or

(5) An affiliate of the FDIC-supervised insured depository institution;

Retail forex transaction means an agreement, contract, or transaction in foreign currency, other than an identified banking product or a part of an

identified banking product, that is offered or entered into by FDIC-supervised insured depository institution with a person that is not an eligible contract participant and that is:

(1) A contract of sale of a commodity for future delivery or an option on such a contract;

(2) An option, other than an option executed or traded on a national securities exchange registered pursuant to §6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78(f)(a)); or

(3) Offered or entered into on a leveraged or margined basis, or financed by an FDIC-supervised insured depository institution, its affiliate, or any person acting in concert with the FDIC-supervised insured depository institution or its affiliate on a similar basis, other than:

(i) A security that is not a security futures product as defined in §1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)); or

(ii) A contract of sale that—

(A) Results in actual delivery within two days; or

(B) Creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business; or

(iii) An agreement, contract, or transaction that the FDIC determines is not functionally or economically similar to:

(A) A contract of sale of a commodity for future delivery or an option on such a contract; or

(B) An option, other than an option executed or traded on a national securities exchange registered pursuant to Section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78(f)(a)).

Retail forex obligations means obligations of a retail forex customer with respect to retail forex transactions, including, but not limited to, trading losses, fees, and commissions.

§ 349.3 Prohibited transactions.

(a) *Fraudulent conduct prohibited.* No FDIC-supervised insured depository institution or its IAPs may, directly or indirectly, in or in connection with any retail forex transaction:

(1) Cheat or defraud or attempt to cheat or defraud any person;

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(2) Willfully make or cause to be made to any person any false report or statement or cause to be entered for any person any false record; or

(3) Willfully deceive or attempt to deceive any person by any means whatsoever.

(b) *Acting as counterparty and exercising discretion prohibited.* If an FDIC-supervised insured depository institution can cause retail forex transactions to be effected for a retail forex customer without the retail forex customer's specific authorization, then neither the FDIC-supervised insured depository institution nor its affiliates may act as the counterparty for any retail forex transaction with that retail forex customer.

§ 349.4 Filing procedures.

(a) *General.* Before commencing a retail forex business, an FDIC-supervised insured depository institution shall provide the FDIC prior written notice and obtain the FDIC's prior written consent.

(b) *Where to file.* A notice required by this section shall be submitted in writing to the appropriate FDIC office.

(c) *Contents of filing.* A complete letter notice shall include the following information:

(1) *Filings generally.* (i) A brief description of the FDIC-supervised institution's proposed retail forex business and the manner in which it will be conducted;

(ii) The amount of the institution's existing or proposed direct or indirect investment in the retail forex business as well as calculations sufficient to indicate compliance with all capital requirements in § 349.8 and all other applicable capital standards;

(iii) A copy of the FDIC-supervised insured depository institution's comprehensive business plan that includes a discussion of, among other things, how the operation of the retail forex business is consistent with the institution's overall strategy;

(iv) A description of the FDIC-supervised insured depository institution's target customers for its proposed retail forex business and related information, including without limitation credit evaluations, customer appropriateness,

and "know your customer" documentation;

(v) A resolution by the FDIC-supervised insured depository institution's board of directors that the proposed retail forex business is an appropriate activity for the institution and that the institution's written policies, procedures, and risk measurement and management systems and controls address conducting retail forex business in a safe and sound manner and in compliance with this part;

(vi) Sample risk disclosures sufficient to demonstrate compliance with § 349.6.

(2) *Copy of application or notice filed with another agency.* If an FDIC-supervised insured depository institution has filed an application or notice with another regulatory authority which contains all of the information required by subparagraph (c)(1) of this part, the institution may submit a copy to the FDIC in lieu of a separate filing.

(3) *Additional information.* The FDIC may request additional information to complete the processing of the notification.

(d) *Treatment of Existing Retail Forex Business.* Any FDIC-supervised insured depository institution that is engaged in retail forex business on July 15, 2011 may continue to do so for up to six months, subject to an extension of time by the FDIC, provided that it notifies the FDIC of its retail forex business and requests the FDIC's written consent in accordance with paragraph (a) of this section.

(e) *Compliance with the Commodities Exchange Act.* Any FDIC-supervised insured depository institution that is engaged in retail forex business on July 15, 2011 shall be deemed, during the six-month period (including any extension) provided in paragraph (e) of this section, to be acting pursuant to a rule or regulation described in § 2(c)(2)(E)(ii)(I) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(E)(ii)(I)).

§ 349.5 Application and closing out of offsetting long and short positions.

(a) *Application of purchases and sales.* Any FDIC-supervised insured depository institution that—